

2014 WL 5282010 (Alaska) (Appellate Brief)  
Supreme Court of Alaska.

STATE OF ALASKA, Office of Public Advocacy, Office of **Elder** Fraud & Assistance, Appellant/Cross-Appellee,  
v.  
Estate of Jean Clark ROGERS and Sidney Fadaoff, Appellees/Cross-Appellants.

Nos. S15326, S15356.  
June 3, 2014.

Appeal from the Superior Court First Judicial District at Juneau the Honorable Judge Phillip Pallenberg  
Superior Court NO. 1JU-12-00179 PR

**Brief of Appellees and Cross Appellants Estate of Jean Clark Rogers and Sidney Fadaoff**

Gruening & Spitzfaden, Apc, 217 Second Street, Suite 204, Juneau, Alaska 99801, (907) 586-8110, [Robert S. Spitzfaden](#), AK Bar No. 7710171, for appellees/cross appellant.

**\*i TABLE OF CONTENTS**

TABLE OF CASES .....	ii
STATUTES, CIVIL RULES, REGULATIONS, .....	iii
TEXT .....	iv
CROSS APPELLANTS BRIEF .....	1
I. JURISDICTIONAL STATEMENT .....	1
II. STATEMENT OF ISSUES .....	2
III. STATEMENT OF THE CASE .....	2
IV. STANDARD OF REVIEW .....	4
V. ARGUMENT .....	5
A. Applicable Law Regarding the Conservatorship Petition .....	5
B. No Issues Remained To Be Decided .....	6
C. Attorney Fees Award in 1JU-12-179PR .....	9
D. <a href="#">AS 13.26.353(c)</a> Supports A Fees Award .....	13
VI. CONCLUSION .....	14
APPELLEE BRIEF .....	15
I. STATEMENT OF ISSUES .....	15
II. STATEMENT OF THE CASE .....	15
III STANDARD OF REVIEW .....	19
IV. ARGUMENT .....	19
V. CONCLUSION .....	27

**\*ii TABLE OF CASES**

Cases	
<a href="#">Braun v. Borough</a> , 193 P.3d 719, 727 (Ak. 2008) .....	9
<a href="#">Crittell v. Bingo</a> , 83 P.3d 532, 537 (Ak. 2004) .....	10
<a href="#">DeSalvo v. Bryant</a> , 42 P.3d 525, 530-31 (Ak. 2002) .....	9
<a href="#">Garrison v. Dixon</a> , 19 P3d 1229 .....	passim
<a href="#">In Re Guardianship Of McGregory</a> , 193 P.3d 295, 300 (AK 2008) .....	passim
<a href="#">Johnson v. Johnson</a> , 239 P.3d 393, (AK. 2010) .....	10 23
<a href="#">Marshall v. First Nat'l Bank of Alaska</a> , 97 P.3d 830, 835 (Alaska 2004) .....	26
<a href="#">Mat-Su Medical Center, LLC v. Advanced Pain Centers Of Alaska, Inc.</a> , 218 P.3d 698, 705-706, n. 26 (AK 2009) .....	26

<i>McElroy v. Kennedy</i> , 74 P. 3d 903, 906-907 (Ak. 2003) .....	8
<i>Ransom v. Haner</i> , 362 P.2d 282, 285 (Alaska 1961) .....	26
<i>VanDeusen v. Seavey</i> , 53 P.3d 596, 602-604 (Ak. 2002) .....	9

\*iii STATUTES, CIVIL RULES, REGULATIONS, and OTHER AUTHORITIES RELIED UPON

Statutes

Appellate Rule 204(a)(2) .....	2
AS 13.26.105 .....	15, 16
AS 13.26.106(c) .....	3
AS 13.26.113(c) .....	6
AS 13.26.113(d) .....	6
AS 13.26.165(2) .....	5
AS 13.26.180 .....	1 15, 16
AS 13.26.195(c-d) .....	5
AS 13.26.207 .....	1, 10, 16, 20, 23
AS 13.26.208 .....	1, 10, 16, 23
AS 13.26.209 .....	1, 10, 16, 23
AS 13.26.324(3) .....	1, 7, 9
AS 13.26.344(d) .....	14
AS 13.26.344(h) .....	13
AS 13.26.344(i)(1) .....	14
AS 13.26.344(j)(1) .....	13, 14
AS 13.26.353(c) .....	13, 14, 26, 27
AS 22.05.010(a) .....	2
AS 44.21.415 .....	9, 12, 17, 24
Civil Rule 11 .....	26
Civil Rule 82 .....	10, 14, 22, 23

\*iv TEXT

**Appellate Rule 204(a)(2). Time - Notice - Bonds.**

(a) When Taken - Appeals and Cross-Appeals.... (2) Subsequent Appeals. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the filing of any timely notice of appeal by any other party, or within 30 days from the date shown in the clerk's certificate of distribution on the judgment, whichever period expires last. A post-judgment order awarding or denying costs, attorney's fees, or prejudgment interest, or a final judgment that has been amended to award or deny costs, attorney's fees, or prejudgment interest, may be appealed by filing either a notice of appeal or a motion to amend the points on appeal under subparagraph (a)(5)(A) of this rule within 14 days of the filing of any timely notice of appeal by any other party, or within 30 days from the date shown in the clerk's certificate of distribution on the order, whichever period expires last.

**AS 13.26.105. Petition.**

(a) Any person may petition the court for a finding of incapacity and the appointment of a guardian for oneself or for another person.

(b) The petition for appointment of a guardian must state

(1) the name, age, and address of the petitioner and any relationship to the respondent;

(2) the name, age, and present address of the respondent;

(3) the name and address of the person or facility presently having care, custody, guardianship, or conservatorship of the respondent, if any, and the existence of any other restrictions on the legal capacity of the respondent to act in the respondent's own behalf;

(4) the nature and degree of the alleged incapacity;

(5) the particular type and duration of appointment and the protection and assistance being sought;

(6) the names and addresses, unless they are unknown and cannot reasonably be ascertained, of the individuals most closely related to the respondent by blood or marriage;

(7) the facts supporting the allegations of incapacity and the need for appointment of a guardian;

\*v (8) the names and addresses of persons known to the petitioner who have knowledge that might prove helpful in determining the capacity and needs of the respondent.

(c) The petition may also nominate a guardian and include a request for temporary guardianship as provided in [AS 13.26.140](#) if the petitioner believes there is an imminent danger that the physical health or safety of the respondent will be seriously impaired during the pendency of the guardianship proceeding. A request for temporary guardianship must specify facts that cause the petitioner to believe that a temporary guardian is necessary.

**[AS 13.26.106\(c\)](#). Initial Court Proceedings.**

(c) The court shall appoint a visitor. The visitor shall arrange for evaluations to be performed and prepare a written report to be filed with the court. The court shall also appoint an expert who has expertise in regard to the alleged or admitted incapacity to investigate the issue of incapacity. The visitor shall interview the respondent and the person seeking appointment as guardian, if any. The visitor shall conduct the interviews and investigations necessary to prepare the report and shall arrange for the respondent to be examined by the expert appointed under this section. The expert's written report shall be attached to the visitor's report. Interviews and examinations shall take place in the respondent's usual residence unless

(1) the respondent consents to being examined or interviewed in a medical or mental health facility; or

(2) the visitor considers it necessary to conduct interviews or examinations in a medical or mental health facility.

**[AS 13.26.113\(c\)\(d\)](#). Hearing and determination.**

(c) If the respondent is found to be incapacitated, the court shall determine the extent of the incapacity and the feasibility of alternatives to guardianship to meet the needs of the respondent.

(d) If it is found that alternatives to guardianship are feasible and adequate to meet the needs of the respondent, the court may dismiss the action and order an alternative form of protection.

**[AS 13.26.165\(2\)](#). Protective proceedings.**

... (2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

\*vi (A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, detention by a foreign power, or disappearance; and

(B) the person has property that will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and protection is necessary or desirable to obtain or provide funds.

**AS 13.26.180. Original petition for appointment or protective order.**

(a) The person to be protected, a person's attorney or other legal representative, any person who is interested in the estate, affairs, or welfare of the person to be protected, including a parent, guardian, custodian, or caregiver, the Department of Health and Social Services, or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

(b) The petition must set out to the extent known, the interest of the petitioner; the name, age, residence and address of the person to be protected; the name and address of the person's guardian, if any; the name and address of the person's nearest relative known to the petitioner; a general statement of the person's property with an estimate of its value, including any compensation, insurance, pension or allowance to which the person is entitled; and the reason why appointment of a conservator or other protective order is necessary. If the appointment of a conservator is requested, the petition also must set out the name and address of the person whose appointment is sought and the basis of priority for appointment.

(c) The petition may include a request for temporary conservatorship as provided in [AS 13.26.206](#) if it appears that the respondent's property is likely to be wasted or dissipated during the pendency of the conservatorship proceeding. A request for temporary conservatorship must specify the facts that cause the petitioner to believe that a temporary conservatorship is necessary.

**AS 13.26.195(c)(d)**

(c) After hearing, upon finding that a basis for the appointment of a conservator or other protective order has been established, the court shall make an appointment or other appropriate protective order.

\*vii (d) The court shall investigate alternatives to a conservator and the use of a special conservator as provided in [AS 13.26.205](#)  
(c). A conservator may be appointed only if a less restrictive protective order or the services of a special conservator are not adequate to protect the estate of the protected person. The court shall, to the extent possible, consult with the protected person in determining what action should be taken.

**AS 13.26.207. Ex parte protective orders.**

(a) A person who is allowed to file a petition for a protective order under [AS 13.26.180 \(a\)](#) may file a petition for an ex parte protective order against a person other than the protected person. A petition filed on behalf of a protected person by a person other than the protected person must be accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm. If the court finds that the petition establishes probable cause that the respondent is **financially** defrauding the petitioner or a person for whose benefit the petitioner filed the petition and that, because of the fraud, there has been or is an immediate threat of a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent.

(b) An ex parte protective order under this section may

(1) grant any protection described in [AS 13.26.200](#);

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, unless dissolved earlier by the court at the request of the petitioner or respondent and after notice and, if requested, a hearing, or on the earlier appointment of a temporary or permanent conservator.

**[AS 13.26.208. Temporary protective orders; conversions.](#)**

On application filed with the court before the expiration of a 20-day ex parte protective order issued under [AS 13.26.207](#), the court shall schedule a hearing on whether to convert the protective order to a temporary order effective for up to six months. The court shall provide to the protected person and the respondent at least 10 days' notice of the \*viii hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may convert the ex parte protective order to a temporary protective order effective for up to six months.

**[AS 13.26.209. Protective orders; modification; third-party compliance; forms; fees.](#)**

(a) The petitioner, respondent, or protected person, if the protected person is a vulnerable adult, may request modification of a protective order issued under [AS 13.26.207](#) [13.26.209](#). Except as provided in (b) of this section, if a request is made for modification of

(1) an ex parte protective order issued under [AS 13.26.207](#), the court shall schedule a hearing on three days' notice or on shorter notice as the court may prescribe; or

(2) a temporary protective order, after notice and hearing under [AS 13.26.208](#), the court shall schedule a hearing within 20 days after the date the request is made, except that, if the court finds that the request is meritless on its face, the court may deny the request without a hearing.

(b) If a request for a modification is made under this section and the respondent raises an issue not raised by the petitioner, the court may allow the petitioner additional time to respond.

(c) If the court modifies a protective order, the court shall issue a modified order and shall make reasonable efforts to ensure that the order is understood by the petitioner, the respondent, and the protected person who are present at the hearing.

(d) The court shall cause a copy of a protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person and have a protective order and any related order delivered to the appropriate local law enforcement agency for expedited entry in the central registry under [AS 18.65.540](#).

(e) A protective order issued under [AS 13.26.207](#) - [13.26.209](#) is in addition to any other civil or criminal remedy.

(f) A third party that has received actual or legal notice of a protective order issued under [AS 13.26.207 - 13.26.209](#) shall comply with the order. A third party who does not comply with a protective order granted under [AS 13.26.207 - 13.26.209](#) may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed \$1,000, plus the actual damages, costs, and fees associated with the failure to comply with the protective order. A third party who does not comply with a protective order granted under [AS 13.26.207 - 13.26.209](#) may also be criminally liable under [AS 11.56.740](#) for violating a protective order. As used in this section, “actual \*ix or legal notice” means delivery by mail or facsimile at the most recently known place of residence or business of the third party.

(g) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of **elder** fraud and assistance, the long term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions and protective orders and instructions for use of the forms by a person seeking a protective order under [AS 13.26.207 - 13.26.209](#). The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(h) Filing fees may not be charged for a petition under [AS 13.26.207](#), for an application under [AS 13.26.208](#), or for a request for modification of a protective order under [AS 13.26.209\(a\)](#).

#### [AS 13.26.324\(3\)](#). Definitions.

(3) exploitation of another person or another person's resources for personal profit or advantage if no significant benefit accrues to the person who is exploited.

#### [AS 13.26.344\(d\)](#). Interpretation of provisions in statutory form power of attorney.

(d) In a statutory form power of attorney, the language conferring general authority with respect to banking transactions shall be construed to mean that, as to a banking transaction engaged in by the principal, whether in the state or elsewhere, the principal authorizes the agent to

(1) continue, modify, or terminate a deposit account or other banking arrangement made by or on the behalf of the principal before the execution of the power of attorney;

(2) open, either in the name of the agent alone or in the name of the principal alone, or in both their names jointly, a deposit account of any type in a **financial** institution selected by the agent, hire a safe deposit box or vault space, and enter into contracts for the procuring of other services made available by the institution that the agent considers desirable;

(3) make, sign, and deliver checks or drafts for any purpose, and withdraw funds or property of the principal deposited with or left in the custody of a **financial** institution, wherever located, either before or after the execution of the power of attorney;

\*x (4) prepare **financial** statements concerning the assets and liabilities or income and expenses of the principal, and deliver the statements to a **financial** institution or person whom the agent believes to be reasonably entitled to them;

(5) receive statements, vouchers, notices, or other documents from a **financial** institution and act with respect to them;

(6) have free access to a safe deposit box or vault to which the principal would have access if personally present;

(7) borrow money as the agent may determine, give security out of the assets of the principal as the agent considers necessary for the borrowing, and pay, renew, or extend the time of payment of a **financial** institution by any other procedure made available by the institution;

(8) make, assign, endorse, discount, guarantee, and negotiate promissory notes, bills of exchange, checks, drafts, or other negotiable or nonnegotiable paper of the principal, or payable to the principal or to the principal's order, receive the cash or other proceeds of them; and accept any bill of exchange or draft drawn by any person upon the principal, and pay it when due;

(9) receive for the principal and deal in and with a negotiable or nonnegotiable instrument in which the principal has or claims to have an interest;

(10) apply for and receive letters of credit or traveler's checks from a banker or banking institution selected by the agent, giving indemnity or other agreements in connection with the applications or receipts that the agent considers desirable or necessary;

(11) consent to an extension in the time of payment with respect to commercial paper or a banking transaction in which the principal has an interest or by which the principal is, or might be, affected in any way;

(12) pay, compromise, or contest taxes or assessments and apply for refunds in connection with the payment, compromise, or contest;

(13) demand, receive, or obtain money or any other thing of value to which the principal is, or may become, or may claim to be entitled as the proceeds of any banking transaction conducted by the principal or by the agent in the execution of the powers described in this subsection, or partly by the principal and partly by the agent; conserve, invest, disburse, or use anything received for purposes enumerated in this subsection, and reimburse the **\*xi** agent for an expenditure properly made in the execution of the powers conferred by the statutory form power of attorney;

(14) execute, acknowledge, seal, and deliver an instrument, in the name of the principal or otherwise, that the agent considers useful for the accomplishment of a purpose enumerated in this subsection;

(15) prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to, a claim existing in favor of, or against, the principal based on or involving a banking transaction, or intervene in an action or proceeding relating to a banking transaction;

(16) hire, discharge, and compensate an attorney, accountant, expert witness, or assistant when the agent considers that the action is desirable for the proper execution of the powers described in this subsection, and for the keeping of records about that action; and

(17) do any other act or acts that the principal can do through an agent in connection with a banking transaction that does or might in any way affect the **financial** or other interests of the principal.

**AS 13.26.344(h). Interpretation of provisions in statutory form power of attorney.**

(h) In a statutory form power of attorney, the language conferring general authority with respect to gift transactions shall be construed to mean that, as to a gift that is made outright, in trust, in custodial account, or otherwise, in which the principal is interested, whether the object of the gift is located in the state or elsewhere, the principal authorizes the agent to

(1) make gifts from any or all of the principal's real and personal property, and in the kinds or shares that the agent considers prudent for any purpose, except that the agent or a person whom the agent has a legal obligation to support when the gift is in full or partial satisfaction of that obligation may not be the beneficiary of the gift unless the principal specifically provides

under subdivision (O) of the statutory form power of attorney that the agent or the person whom the agent has a legal obligation to support may be the beneficiary of the gift if authorized;

(2) submit to arbitration or settle, and to propose or accept a compromise with respect to a controversy or claim that affects the gift;

\*xii (3) hire, discharge, and compensate an attorney, accountant, expert witness, or assistant when the agent considers the action to be desirable for the proper execution of the powers described in the subsection, and for the keeping of records about that action;

(4) do any other act or acts that the principal can do through an agent, with respect to any gift.

**AS 13.26.344(i)(1). Interpretation of provisions in statutory form power of attorney.**

(i) In a statutory form power of attorney, the language conferring general authority with respect to claims and litigation shall be construed to mean that, as to any claim or litigation, whether arising in the state or elsewhere, the principal authorizes the agent to

(1) assert and prosecute before any court, administrative board, department, or other tribunal a cause of action, claim, counterclaim, offset, or defense that the principal has, or claims to have, against an individual, partnership, association, corporation, government, or other person or instrumentality, including, by way of illustration, and not of restriction, power to sue for the recovery of land or of any other thing of value, for the recovery of damages sustained by the principal in any manner for damages sustained as a result of the refusal of a third party to honor the power of attorney, for the elimination or modification of tax liability, for an injunction, for specific performance, or for any other relief;

**AS 13.26.344(j)(1). Interpretation of provisions in statutory form power of attorney.**

(j) In a statutory form power of attorney, the language conferring general authority with respect to personal relationships shall be construed to mean that, as to real and personal property owned by the principal, whether in the state or elsewhere, the principal authorizes the agent to

(1) do all acts necessary to maintain the customary standard of living of the spouse, children, and other dependents of the principal, including by way of illustration and not by way of restriction, power to provide living quarters by purchase, lease, or by other contract, or by any payment of the operating costs, including interest, amortization payments, repairs, and taxes, of premises owned by the principal and occupied by the principal's family or dependents, to provide normal domestic help for the operation of the household, to provide usual vacations and usual travel expenses, to provide usual educational facilities, and to provide funds for all the current living costs of the spouse, children, and other dependents, including, among other things, shelter, clothing, food, and incidentals;

**\*xiii AS 13.26.353(c). Provisions applicable to statutory form power of attorney.**

(c) A third party shall honor the terms of a properly executed statutory form power of attorney. A third party who fails to honor a properly executed statutory form power of attorney may be liable in a civil action to the principal, the attorney-in-fact, or the principal's heirs, assigns, or estate for a civil penalty not to exceed \$1,000, plus the actual damages, costs, and fees associated with the failure to comply with the statutory form power of attorney. The civil action shall be the exclusive remedy at law for damages.

**AS 22.05.010(a). Jurisdiction.**

(a) The supreme court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.

**AS 44.21.415 Office of elder fraud and assistance.**

(a) The office of elder fraud and assistance is established in the office of public advocacy to investigate complaints involving fraud committed against older Alaskans who are not otherwise able to bring a complaint without assistance, as defined in regulation, and to provide assistance to older Alaskans who are victims of fraud. The office shall work with local, state, and national law enforcement and social service agencies through cooperative agreements and may bring civil enforcement actions for injunctive and other relief for fraud committed against older Alaskans.

(b) In conducting an investigation under this section, the office of elder fraud and assistance may issue subpoenas, conduct interviews, and examine the business records, advances, transactions, and relevant records associated with the alleged fraud committed against an older Alaskan. The office may enter into contracts with attorneys and seek a court order to enforce a subpoena.

(c) In addition to the functions described under (a) and (b) of this section, the office of elder fraud and assistance shall provide information, referrals, and other assistance to older Alaskans who are victims of fraud and make recommendations to the commissioner for regulations on eligibility for assistance needed to implement this section.

(d) A cooperative agreement under (a) of this section must include a description of office operations and investigation protocols.

(e) Subject to the discretion of the court and standards established in regulation adopted by the commissioner of administration and taking into consideration the financial \*xiv condition of the parties to a civil suit brought under this section, the office of public advocacy may seek recovery of all or part of litigation costs and fees from any party, including costs incurred during the investigation of the case, when the office of public advocacy is found to be a prevailing party after trial or settlement negotiation. The office of public advocacy shall enter into a fee agreement with a client that is consistent with this section, the Alaska Rules of Court, and the Alaska Rules of Professional Conduct.

(f) Nothing in this section prohibits the Department of Law from investigating or prosecuting a person for unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce under AS 45.50.471 and 45.50.495.

(g) In this section,

(1) “fraud” means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) offenses against property under AS 11.46.100 - 11.46.740; or

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) “older Alaskan” means a person residing in the state who is 60 years of age or older.

**Civil Rule 11. Signing of Pleadings, Motions, and Other Papers.**

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name-- or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and

telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

\*xv (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

#### **Civil Rule 82. Attorney's Fees.**

(a) Allowance to Prevailing Party. Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) Amount of Award.

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

Judgment and, if awarded, Prejudgment Interest	Contested w/Trial	Contested w/o Trial	Non-Contested
First \$ 25,000	20%	18%	10%
Next \$ 75,000	10%	8%	3%
Next \$400,000	10%	6%	2%
Over \$500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

\*xvi (B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant. If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) Motions for Attorney's Fees. A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by [Civil Rule 58.1](#). Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

(d) Determination of Award. Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) Equitable Apportionment Under [AS 09.17.080](#). In a case in which damages are apportioned among the parties under [AS 09.17.080](#), the fees awarded to the plaintiff \*xvii under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under [Civil Rule 14\(c\)](#), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

(f) Effect of Rule. The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

## **\*1 CROSS APPELLANTS BRIEF**

### **I. JURISDICTIONAL STATEMENT**

Shelley Thissen<sup>1</sup> filed a Petition for Appointment of a Conservator ([AS 13.26.180](#)) (case no. 1JU-12-179PR) on July 2, 2012. Exc. 86-92. She subsequently filed a revised Petition for Appointment of a Guardian/Conservator on August 2, 2012.<sup>2</sup> Exc. 95-102. Kathleen Fredericks<sup>3</sup> filed a Petition for Protection from **Financial Abuse** ([AS 13.26.207-AS13.26.209](#)) (herein Fraud Petition) on August 20, 2012. (case no. 1JU-12-212PR). Exc. 1-6. The cases were consolidated. Exc. 11-12.

To grant the Fraud Petition required a finding of probable cause that Ms. Fadaoff was **financially** defrauding Mrs. Rogers and because of the fraud, there was an immediate threat of waste or dissipation of Mrs. Rogers' funds or property. [AS 13.26.207\(a\)](#). "Fraud" for purpose of the Fraud Petition is "exploitation of another person or another's person's resources for personal profit or advantage if no significant benefit accrues to the person who is exploited." [AS 13.26.324\(3\)](#).<sup>4</sup>

\*2 The court denied the Fraud Petition on September 7, 2012, holding there was no fraud or exploitation. Tr. 402-406. The Superior Court determined that the Fraud Petition "was brought without just cause". Exc.54. The parties stipulated to dismissal of 1JU-12-179PR and 1JU-12-212PR on January 4, 2013 in accordance with their settlement agreement. Exc. 361-364. The court issued an order awarding attorney fees of \$8,607.75 to Jean Rogers and \$14,025.00 Sidney Fadaoff on August 26, 2013, stemming from the Fraud Petition. (1JU-12-179PR) Exc. 50-59. The Superior Court denied Mrs. Rogers and Ms. Fadaoff's motion for attorney fees in the Conservatorship Petition (1JU-12-179PR), in which they sought \$20,107.00 and \$22,170.00 respectively. Exc. 50-59.

OEFA appealed the Superior Court's award of attorney's fees to Mrs. Rogers and Ms. Fadaoff in 1JU-12-179PR. Mrs. Rogers and Ms. Fadaoff timely cross appealed the Superior Court's denial of their motion for fees in 1JU-12-212PR. The Court has jurisdiction to hear this cross-appeal pursuant to [AS 22.05.010\(a\)](#) and [Appellate Rule 204\(a\)\(2\)](#).

### **II. STATEMENT OF ISSUES**

The trial court erred in its August 26, 2013 order in refusing to award the attorney fees sought by Mrs. Rogers (\$220,107) and Ms. Fadaoff. (\$22,170) in 1JU-12-212PR.

### **III. STATEMENT OF THE CASE**

As set out above, Shelley Thissen filed a conservatorship petition on July 2, 2012, and subsequently filed a second petition for a conservatorship/guardianship on August 2, \*3 2012, and Mr. Fredericks filed the Fraud Petition on August 20, 2012. The facts regarding the Fraud Petition are set out below in Appellee's Brief's Statement of the Case. Following the Superior Court's denial of the Fraud Petition on September 7, 2012<sup>5</sup>, there remained the Conservatorship Petition.

Sidney Fadaoff held Mrs. Rogers' power of attorney<sup>6</sup>. Exc. 67-71. Ms. Fadaoff resided in the upstairs apartment at 1790 Evergreen, while Mrs. Rogers resided in the main portion. Mrs. Rogers did not dispute that due to her dementia she was unable to care for herself or manage her affairs. It was undisputed below that she was well cared for. Tr. 18-19 (testimony of Dr. Urata-the expert appointed pursuant to AS 13.26.106(c)); Exc. 360. The Visitor's report<sup>7</sup> indicates Mrs. Rogers was well cared for and in a loving environment, Exc. 106-109. She was not left alone as when Ms. Fadaoff was absent, Mr. Jim Williams (Ms. Fadaoff's boyfriend who resided with her in the apartment), Mrs. Rogers' granddaughter Anisia Sisikin or Mrs. Rogers' son Garth, provided care. Tr. 332-333. The house phone was unplugged and went to an answering machine for people to leave messages for Mrs. Rogers. Tr. 360-362. Anyone wishing to speak to Mrs. Rogers needed only to call Ms. Fadaoff's cell phone. Id. There was a baby monitor in place 24 hours a day which connected to Ms. Fadaoff and Mr. Williams upstairs apartment. Tr. \*4 362. Mrs. Rogers wore and knew how to operate a lifeline for outside help if she was in trouble. Tr. 362-363.

Following the September hearing, with respect to the Conservatorship Petition, given that Mrs. Rogers was well cared for, the only issue was whether Ms. Fadaoff was wasting or dissipating Mrs. Rogers' assets. However, the September hearing had already found that Ms. Fadaoff was not defrauding, wasting or dissipating Mrs. Rogers' assets. Tr. 402-406. Nonetheless, OEFA continued to vigorously pursue the Conservatorship Petition, issuing a subpoena and attempting to undertake the investigation it should have taken prior to the hearing on the Fraud Petition. It is clear from the affidavit of OFEA investigator Eliezer Feliciano of October 19, 2012, that following the September hearing resolving the fraud claim, he reviewed Alaska Pacific Bank records that OEFA received August 28, 2012. Exc. 44-45. Yet a number of the allegations in the October 19 affidavit were not raised at the September hearing. Tr. 230-239. In short, OEFA sought to relitigate the adverse ruling in the Fraud Petition. Doing so was in bad faith, malicious, frivolous and done without just cause.

#### IV. STANDARD OF REVIEW

An award of fees in a guardianship is reviewed by this Court to determine if there was clear error. *In Re Guardianship Of McGregory*, 193 P.3d 295, 300 n. 18. (Ak. 2008). An award of attorney fees pursuant to Rule 82 is reviewed for **abuse** of discretion, with **abuse** to be found if the award is arbitrary, capricious, manifestly unreasonable, or stems from improper motive. *Garrison v. Dixon*, 19 P.3d 1229, 1231 (Ak. 2001).

#### \*5 V. ARGUMENT

There were no factual issues remaining to be resolved after the Superior Court's resolution of the Fraud Petition. Thus it was manifestly unreasonable and clear error to not award the fees requested by Mrs. Rogers and Ms. Thissen.

There was no dispute Mrs. Rogers was well taken care of, and the Superior Court held there was no fraud. Hence there was no basis to pursue the Conservatorship Petition. OEFA's pursuit of the Conservatorship Petition after the September 7 decision on the Fraud Petition was in bad faith, malicious, frivolous and done so without just cause.

The Superior Court did not award fees for the Conservatorship Petition because it determined that issues remained to be resolved. Exc. 55-56. That reasoning is faulty because there were no facts that would have supported relief in the Conservatorship Petition.

#### A. Applicable Law Regarding the Conservatorship Petition.

AS 13.26.165(2) provides that the court may appoint a conservator or make another protective order, if, (i) the person is unable to manage her property and affairs, and (ii) the person's property will be wasted or dissipated without proper management. The Conservatorship Petition focused on whether Mrs. Rogers' property would be wasted or dissipated, as she did not dispute

that due to dementia she was unable to manage her own affairs. The court is to investigate alternatives to a conservator. [AS 13.26.195\(c-d\)](#). One may only have been appointed if a less restrictive protective order was not adequate to protect Mrs. Rogers' property. *Id.* Here, there was no need for a conservatorship, or a \*6 less restrictive order, because Mrs. Rogers' already had in place an attorney in fact to protect her property, her daughter Sidney Fadaoff, *Exc.* 67-71; and the Superior Court had already ruled (*Tr.* 402-406) there was no fraud or waste or dissipation of assets, hence no factual basis to limit or remove Ms. Fadaoff as attorney in fact.

Pursuant to applicable guardianship law, as Mrs. Rogers was incapacitated, the court was to determine the extent of incapacity and the feasibility of alternatives to guardianship to meet her needs. [AS 13.26.113\(c\)](#). If alternatives to guardianship were feasible and adequate to meet Mrs. Rogers' needs, the court could dismiss the action and order an alternative form of protection. [AS 13.26.113\(d\)](#). In this case, there were in place adequate and feasible alternatives as Ms. Fadaoff had Mrs. Rogers' power of attorney, and was her agent pursuant to the Advanced Health Care Directive. *Exc.* 72-79. OEFA produced no evidence Mrs. Rogers was not well cared for. There was no factual basis to take from Ms. Fadaoff the powers granted by those documents given: (i) it was undisputed Mrs. Rogers was well cared for; and (ii) the Superior Court's ruling there was no fraud, waste or dissipation.

### **B. No Issues Remained To Be Decided.**

There were no issues to be decided once the Superior Court resolved the Fraud Petition. Mrs. Rogers did not contest she had dementia and could not manage her affairs. Ms. Fadaoff held Mrs. Rogers' power of attorney and durable power for health care decisions, and was providing for her well-being, physical and mental, as well as handling \*7 her **finances**. The question in the Conservatorship Petition was whether Ms. Fadaoff should continue to do so.

OEFA did not assert that Mrs. Rogers was not receiving proper care. See OEFA's October 16, 2012 opposition to the motion for summary judgment and its November 1, 2012 sur-reply, neither of which raise any factual issue concerning care <sup>8</sup>. R. 455-460, 549. Instead the sur-reply in particular sought to raise various fraud issues, despite fraud having already been resolved.

OEFA's only attack was on Ms. Fadaoff's handling of Mrs. Rogers' property. Essentially OEFA's position was that because Ms. Fadaoff was committing fraud, she was not fit to continue as Mrs. Rogers' power of attorney to handle her **financial** affairs. Yet, the Superior Court's September 7 ruling that Ms. Fadaoff had not committed fraud, resolved all fraud issues that were or could have been raised. Accordingly, there were no facts on which to rest a claim for removing Ms. Fadaoff.

OEFA continued to press the already decided fraud issues despite the Superior Court's ruling she had not exploited Mrs. Rogers' resources for personal profit or advantage with no benefit accruing to Mrs. Rogers, and hence there was no waste or dissipation. [AS 13.26.324\(3\)](#). Given *res judicata* and collateral estoppel, to continue to \*8 pursue the waste issue in the Conservatorship Petition was vexatious, frivolous, not in good faith and without just cause.

*Res judicata* and collateral estoppel prevented OEFA from re-litigating the fraud issues, both those raised or that could have been raised. *McElroy v. Kennedy*, 74 P.3d 903, 906-907 (Ak. 2003) sets out the requirements for *res judicata* and collateral estoppel as well as explaining the doctrines of claim and issue preclusion.

"*Res judicata* consists of both claim preclusion and issue preclusion." Claim preclusion "prevents a party from suing on a claim which has been previously litigated to a final judgment by that party... and precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action." We have held that "a final judgment in a prior action bars a subsequent action if the prior judgment was (1) a final judgment on the merits, (2) from a court of competent jurisdiction, (3) in a dispute between the same parties (or their privies) about the same cause of action."

Whereas claim preclusion bars the litigation of any cause of action arising out of a claim which has already been litigated, issue preclusion, or collateral estoppel, renders an issue of fact or law which has already been decided by a court of competent

jurisdiction conclusive in a subsequent action between the same parties, whether on the same or a different claim. To determine whether issue preclusion applies, we ask whether:

- (1) the party against whom the preclusion is employed was a party to or in privity with a party to the first action;
- (2) the issue precluded from relitigation is identical to the issue decided in the first action;
- (3) the issue was resolved in the first action by a final judgment on the merits; and
- (4) the determination of the issue was essential to the final judgment.”

Here, there was a final judgment on the merits in the Fraud Petition (Tr. 402-406), the Superior Court was a court of competent jurisdiction, the same parties are present (OEFA \*9 and Mrs. Rogers and Ms. Fadaoff), and the same determinative factual issues are present, whether Ms. Fadaoff committed fraud, waste or dissipation.<sup>9</sup>

### C. Attorney Fees Award in 1JU-12-179PR.

OEFA is liable for full reasonable fees in an unsuccessful guardianship proceeding where its conduct has been vexatious, malicious, frivolous or in bad faith, or the case was brought without just cause. *In Re Guardianship Of McGregory*, 193 P.3d 295, 300 (AK 2008).

The settlement agreement<sup>10</sup> entered into by the parties required dismissal of both 1JU-12-212PR (the Fraud Petition) and 1JU-12-179PR Conservatorship Petition, resolving those cases in Mrs. Rogers and Ms. Fadaoffs favor since there was no finding of fraud or the creation of a guardianship/conservatorship. The parties dismissed the case. Exc. 365-378. A party may be determined to be the prevailing party for attorney fees purpose where its actions result in an agreement with a favorable resolution of the case. *VanDeusen v. Seavey*, 53 P. 3d 596, 602-604 (Ak. 2002); *See DeSalvo v. Bryant*, 42 P. 3d 525, 530-31 (Ak. 2002), and *Braun v. Borough*, 193 P.3d 719, 727 (Ak. 2008). The parties agreement reserved the issue of an award of attorney fees for resolution by the court.

\*10 *In Re Guardianship of McGregory* 193 P.3d at 300 (Ak 2008), applied [Civil Rule 82](#) to an award of fees against the State of Alaska, but only to the extent the State acted vexatiously, in bad faith, maliciously, frivolously or brought the case without just cause. The Superior Court extended *McGregory* to award the fees here at issue in this protective proceedings under [AS 13.26.207](#) – [AS 13.26.209](#), the Fraud Petition.

[Civil Rule 82\(b\)\(3\)\(g\)](#) supports the award of fees. [Civil Rule 82\(b\)\(3\)\(g\)](#) provides for an award of full fees if the losing party acted vexatiously or in bad faith, with full fees to be awarded where the facts are so deficient as to reasonably permit an inference of vexatious or bad faith litigation conduct, as the following establish:

“But our case law establishes that an award of enhanced fees under [Rule 82](#) may be based on vexatious and bad faith litigation “both as to the filing of the case and the prosecution of it.” *Crittell v. Bingo*, 83 P.3d 532, 537 (Ak. 2004).

A fees award is to be affirmed where the facts are so deficient as to reasonably permit an inference of vexatious or bad faith litigation conduct.

“The superior court largely denied the three requests, but denial does not in itself establish that the requests were made vexatiously or in bad faith. The issue is not whether they were ultimately unsuccessful, but whether they were collectively or individually so lacking in merit that it is permissible to infer that Sam or his lawyer acted in bad faith or engaged in vexatious

litigation conduct. If a request was either legally or factually so deficient as to reasonably permit an inference of vexatious or bad faith litigation conduct, we must affirm the award as to that request.” *Johnson v. Johnson*, 239 P.3d 393, (AK. 2010).

In *Garrison v. Dixon*, 19 P3d 1229 (Ak. 2001), the plaintiff produced no credible evidence to support its claim. Nor did OEFA here. Like the *Garrison* plaintiff, OEFA, vigorously pursued its claims, only to ultimately reach a settlement in which Mrs. Rogers and Ms. Fadaoff completely prevailed.

\*11 “We will affirm an award of full, actual attorney's fees under [Rule 82](#) where the superior court finds that the losing party has engaged in vexatious or bad faith litigation. The superior court here made such a finding when it stated that “vexatious bad conduct has been found.” Indeed, the trial court concluded that “[o]ne cannot look at the record before the court and conclude that this action was brought for any purpose but to harass the defendants.” Accordingly, we must affirm the award of full attorney's fees unless the trial court's finding of bad faith is clearly erroneous.”

We consider this issue both as to the filing of the case and the prosecution of it. Looking first to the filing of the case, we consider both the form of the action and the support for it. As to the form of the action, the claims themselves - as distinguished from the evidence ultimately adduced in support of them - met the minimum standards of the statute under which they were brought.

But a review of the factual support for these claims provides a strong basis for the superior court's finding that the action was “frivolous and brought to harass the defendants.” The Garrisons and AARI never produced credible evidence that the central theme of the ads - that dual agency brokers were superior to buye's agency brokers - was unfair or deceptive. They did not produce even one person who had read the ads and could testify to any confusion. They did not show that the ads - which did not mention either the Garrisons or AARI - would be read by anyone as referring to them. They produced no evidence that they had suffered any monetary damage.

Moreover, consideration of the second issue how the Garrisons and AARI prosecuted their action strongly supports the trial court's factual findings that the case was litigated in bad faith. The Garrisons litigated vigorously for two and one-half years before attempting to leave the lawsuit as individual plaintiffs, ultimately conceding that they had no individual claims. Then AARI's remaining claims were all dismissed, on summary judgment, because plaintiffs could not even show that material facts were in dispute. We have previously upheld an award of full attorney's fees against plaintiffs whose claim was found to be brought “merely to harass and delay,” and the record supports a similar conclusion here. Moreover, as we found above, the superior court noted correctly that the parties were business competitors, found that “the purpose of the action was to harass a competitor,” and concluded that “less than full attorney's fees would encourage the use of civil prosecution to chill active competition in various industries.” We cannot say that these findings are clearly erroneous. Accordingly, the superior court did not **abuse** its discretion in awarding full, actual attorney's fees under [Rule 82](#). *Garrison v. Dixon*, 19 P3d at 1234-1235.

\*12 Subsequent to the Superior Court's denial of the Fraud Petition, under the purported authority of [AS 44.21.415](#), OEFA continued to investigate and assert that Ms. Fadaoff had committed fraud, waste and dissipation. OEFA subpoenaed Ms. Fadaoff's tax returns six weeks after the court denied the Fraud Petition, which Ms. Fadaoff opposed. R. 785-795. Mr. Feliciano reviewed the Alaska Pacific Bank records. Exc. 45-46. Yet, OEFA did not introduce any evidence involving fraud in its opposition to Mrs. Rogers' summary judgment motion. R. 455-460.

After the Fraud Petition was denied, OEFA refused to accept the impact of that denial on the pending Conservatorship Petition. OEFA failed to recognize denial of the Fraud Petition resolved any factual issues that were or could have been the basis of the Conservatorship Petition. It failed to recognize that denial of the Fraud Petition barred it from re-litigating the Fraud issues in the Conservatorship Petition. Instead, OEFA continued to pursue the fraud claim. In response, Mrs. Rogers moved for summary judgment and to terminate the standing of OEFA to continue the fraud investigation on the basis of res judicata and collateral estoppel. R. 4-9, 334-341, 342-353. In addition, Mrs. Rogers posed discovery requests to OEFA to learn the basis of the continuing fraud allegations, but OEFA opposed Mrs. Rogers' posing discovery. R. 562-572, 730-736. Mrs. Rogers and Ms.

Fadaoffs incurred attorney fees in continuing to oppose OEFA's continuing pursuit of fraud. Exc. 388-389, 397-399, 403-407. OEFA's continuing to pursue the fraud claim despite the denial of the Fraud Petition, was in bad faith, vexatious, frivolous, and without just cause.

\*13 OEFA's litigation tactics were vexatious. It filed more than one motion for sur reply. R. 492-513, 539-549, 1469-1470. It refused to accept the court's ruling, continuing to hammer away at fraud issues already resolved through the September 7 hearing on the Fraud Petition. OEFA's investigation prior to filing the Fraud Petition amounted to little more than talking to Ms. Thissen and Mr. Rogers and reviewing a few months of the checking account records. Exc. 40 (at para. 5), 44 (at para. 3) <sup>11</sup>.

#### **D. AS 13.26.353(c) Supports A Fees Award.**

As an alternative ground for awarding the fees. AS 13.26.353(c) supports an award. Ms. Fadaoff holds Mrs. Rogers power of attorney. Exc. 67-71. AS 13.26.353 provides that a third party, here OEFA, which fails to honor a properly executed statutory form power of attorney may be liable in a civil action to the power of attorney principal for costs and fees associated with the failure to comply with the statutory form power of attorney.

The power of attorney gave Ms. Fadaoff power, among others, to expend Mrs. Rogers funds to maintain her customary standard of living (AS 13.26.344(j)(1)), to give gifts (AS 13.26.344(h)), to write checks and maintain the bank account ( \*14 AS 13.26.344(d) <sup>12</sup>, defend Mrs. Rogers in court proceedings (AS 13.26.344(i)(1)), and make housing decisions (AS 13.26.344(j)(1)).

Despite the broad authority granted by the power of attorney, OEFA simply ignored Ms. Fadaoff's powers under the power of attorney, ignored Ms. Fadaoff, and sought to take away the powers granted by the power of attorney. In other words, OEFA, failed to honor the power of attorney. It is liable for fees and costs pursuant to AS 13.26.353(c).

OEFA chose to challenge, without sufficient investigation, Ms. Fadaoff's power of attorney. OEFA could make the challenge, but having lost the challenge, AS 13.26.353(c) provides it is liable for an award of Mrs. Rogers' full attorney fees. AS 13.26.353(c) is no different than Civil Rule 82. Civil Rule 82 does not prevent filing the civil suit, but the non-prevailing party is exposed to an award of attorney fees. So under AS 13.26.353(c), attack may be made on the power of attorney, but if unsuccessful, the unsuccessful party is exposed to an award of attorney fees.

## **VI. CONCLUSION**

This Court should reverse the Superior Court and award, in the Conservatorship Petition (1JU-12-179PR), \$20,107.00 to Mrs. Rogers and \$22,170.00 to Ms. Fadaoff.

### **\*15 APPELLEE BRIEF**

#### **I. STATEMENT OF ISSUES**

1. Did the Superior Court properly award attorney fees to the appellees?

#### **II. STATEMENT OF THE CASE**

Sidney Fadaoff agreed with her parents (George and Jean Rogers) to give up her State job, to provide care to them in their home on Evergreen Street in Juneau, Alaska until they died. Tr. 293-307. Exc. 80-85. Agreements were executed to that effect. Id. Ms. Fadaoff and her parents agreed she would live in the upstairs apartment attached to the Rogers' home. Id. Her parents gave

Ms. Fadaoff their power of attorney. Exc. 60-71. Her parents, after consulting counsel, for Medicaid purposes, deeded their home (the Evergreen house) to Ms. Fadaoff. Tr. 253-266. Mr. Rogers passed. Ms. Fadaoff continued to care for her mother, Jean Rogers. Shelley Thissen and Geoff Rogers, two of Jean Rogers' children, live outside Alaska, Ms. Thissen in Salt Lake, Mr. Rogers in Washington. Tr. 289-290, 91, 148. Ms. Fadaoff asked Ms. Thissen to provide temporary care for Mrs. Rogers while Ms. Fadaoff was out of State. Tr. 290-292. Ms. Fadaoff paid for Ms. Thissen's airfare from Salt Lake City out of Mrs. Rogers' funds. Id.

While in Juneau caring for her mother, Ms. Thissen looked at a bank statement and some NSF notices. Tr. 94-100; Exc. 123-130. Based on that review, without confronting Ms. Fadaoff about her concerns, on July 2, 2012, Ms. Thissen filed the first Petition For Appointment Of A Conservator/Guardianship ([AS 13.26.105](#) and [AS 13.26.180](#)) seeking her appointment as guardian. Tr. 100. Exc. 86-92. The \*16 Conservatorship Petition proceeded as 1JU-12-00179CI<sup>13</sup>. The July 2, 2012 Conservatorship Petition alleged the "waste and dissipation" of Mrs. Rogers' assets, but alleged no facts in support of that allegation. Exc. 91. The Conservatorship Petition sought the following relief for the rest of Mrs. Rogers life: "to have custody and decide where respondent will live; apply for benefits for respondent; receive money due to respondent and apply to provide support and care." Exc. 90.

Ms. Thissen filed the second [AS 13.26.105](#) and [AS 13.26.180](#) Petition on August 2, 2012. Exc. 95-102. That Petition alleged Ms. Fadaoff was wasting and dissipating Mrs. Rogers money and assets without benefit to Mrs. Rogers, and that bank records reflected Ms. Fadaoff was not managing affairs in the best interests of Mrs. Rogers, so a guardian should be appointed with full powers of a conservator. Exc. 100.

OEFA moved for and was granted interested party status on August 17, 2012. R. 155-156. OEFA's motion to disqualify Mrs. Rogers' counsel was denied. R. 152.

On August 20, 2012, Kathleen Fredericks, OEFA's attorney, signing in her personal capacity, filed a Petition For Protection From **Financial Abuse** (AS 12.26.207-AS 12.26.209), (the Fraud Petition) which became 1JU-12-00212PR. Exc. 1-6. The Fraud Petition alleged Mrs. Rogers' account was regularly overdrawn and assessed overdraft fees<sup>14</sup>, and the following expenditures were not for Mrs. Rogers' benefit: Trips Ms. \*17 Fadaoff and her boyfriend took to Seattle and Minnesota, building supplies to repair the boyfriends' trailer where his son lived, vet bills for Ms. Fadaoffs cat, and inordinately high grocery bills suggesting Ms. Fadaoff and her boyfriend might be purchasing their groceries from Mrs. Rogers' funds, and payments to Ms. Fadaoff from Mrs. Rogers' account. Exc. 4. The Fraud Petition sought to change the power of attorney held by Ms. Fadaoff so she was limited only to making medical decisions, with housing for Mrs. Rogers to be decided by Ms. Fadaoff, Ms. Thissen, and Mr. Rogers, with a conservator appointed to handle all **financial** affairs. Exc. 5.

The two cases, 1JU-12-00179CI and 1JU-12-00212CI, were consolidated and assigned to Judge Pallenberg after OEFA disqualified Judge Menendez (the judge assigned in 1JU-12-00179CI). R. 1579, 154. Exc. 11-12.

A hearing on the Fraud Petition was held on September 6 and 7, 2012. Judge Pallenberg denied the Fraud Petition. Tr. 402-406.

At the hearing, it was established that OEFA, just six days before filing the Fraud Petition, subpoenaed various bank records for Mrs. Rogers' bank account dating back to 2010. Exc. 213. The subpoena requested the documents by September 10, 2013. Exc. 215.<sup>15</sup> OEFA did not receive the subpoenaed bank records until August 30, 2010, some ten days after Ms. Fredericks executed and filed the Fraud Petition. Exc. 209, 1. At the \*18 September hearing, Mr. Feliciano provided no analysis of the subpoenaed bank records, nor did he provide any testimony as to how the bank records related to the fraud allegations. Tr. 232-237. No evidence of an analysis by OEFA personnel of the banks records regarding the alleged fraud was provided at the hearing. Tr. 232-237, Exc. 121. The only analysis submitted at the hearing was by Mr. Rogers and the analysis was based only on the six month bank records. Exc. 121, 136-207; Tr. 154-155, 187. In preparing the analysis he did not ask Ms. Fadaoff about the specific challenged expenditures. Tr. 191 lines 3-18.

OEFA arranged for Tonya Muldoon of Adult Protective Services, to interview Mrs. Rogers. At the time of the interview, Ms. Muldoon did not have the subpoenaed records. Tr. 68-69. While Ms. Fadaoff was present part of the time, and responded to questions, Ms. Muldoon did not question Ms. Fadaoff about the specific concerns that were raised in the August 20, 2012 Fraud Petition either during the visit at the home or thereafter. Tr. 38-39, 41, 61.

When Ms. Thissen filed her first Conservatorship Petitions, she only had the June bank statement and some NSF notices. Tr. 94-100. She got a May statement shortly after she filed the first petition. Tr. 102-103.

Mr. Geoff Rogers testified he had access to Mrs. Rogers' account, as co-signer, and that he used that access to secure 6 months of bank records. Tr. 151-152. He then prepared various spreadsheets from the records he obtained, utilizing only the bank records to make various categorizations. Tr. 154-155. He did not ask Ms. Fadaoff about \*19 any of the specific concerns he had based on the bank records he reviewed. Tr. 189-191 and specifically Tr. 191 lines 3-18.

The Superior Court denied the Fraud Petition, finding no fraud or exploitation. Tr. 402-406. The Superior Court awarded fees because OEFA had failed to make reasonable inquiries and accordingly failed to properly investigate the case resulting in **financial** and emotional harm to the very person OEFA was charged with protecting, Mrs. Rogers. Exc. 50-59 and in particular Exc. 55 on harm OEFA caused Mrs. Rogers by failing to properly investigate the case.

Ultimately the parties settled with Mrs. Rogers and Ms. Fadaoff completely prevailing. Exc. 361-364. No conservatorship or guardianship was set up, and Ms. Fadaoff retained her power of attorney and durable health care agency. Id.

### III STANDARD OF REVIEW

An award of fees in a guardianship is reviewed by this Court to determine if there was clear error. *In Re Guardianship Of McGregory*, 193 P.3d 295, 300 n. 18. (Ak. 2008). An award of attorney fees pursuant to Rule 82 is reviewed for **abuse** of discretion, with **abuse** to be found if the award is arbitrary, capricious, manifestly unreasonable, or stems from improper motive. *Garrison v. Dixon*, 19 P.3d 1229, 1231 (Ak. 2001).

### IV. ARGUMENT

The Superior Court found OEFA did not conduct a reasonable investigation before filing the Fraud Petition, thus entitling the Estate and Ms. Fadaoff to the fees awarded by \*20 the Superior Court. That finding is not clearly erroneous nor an **abuse** of discretion, so this Court should uphold the award.

The State's appeal is based on incorrectly asserting the fees award was based solely on OEFA's failure to question Ms. Fadaoff. While that failure was part of the Superior Court's reasoning, the Superior Court found OEFA failed to (1) undertake a reasonable investigation, and (2) to properly investigate the allegations being made by Ms. Thissen and Mr. Rogers. Exc. 54-55, 57.

The Superior Court did not set out a bright line rule that the suspected miscreant must be questioned before filing a Fraud Petition, nor are the Estate and Ms. Fadaoff asking this Court to do so. Instead, each case should be judged on its own merits. In this particular case, the lack of a reasonable investigation prior to filing the Fraud Petition warrants upholding the Superior Court's fees award.

OEFA's claim it could not question Ms. Fadaoff in advance of filing the Fraud Petition because to do so would allow her to cover her tracks, fails because Ms. Fadaoff already knew she was being investigated. Ms. Fadaoff was already well aware of the **financial** mismanagement allegations due to the two Conservatorship Petitions filed by Ms. Thissen weeks before OEFA filed the Fraud Petition. OEFA already was pursuing the Conservatorship Petition based on **financial** mismanagement claims when it filed the Fraud Petition. Furthermore, Ms. Fadaoff is entitled to notice of the filing of the Fraud Petition (AS 13.26.207(a)),

unless said Petition itself alleges there would be an immediate threat of harm to the best interests of Mrs. Rogers. The Fraud Petition here \*21 lacked such an allegation<sup>16</sup>, so OEFA itself did not believe Ms. Fadaoff was going to cover her tracks.

OEFA's Brief at pages 4-5 cites to the affidavits of its attorney Kathleen Fredericks and investigator Eliezer Feliciano to establish the reasonableness of the pre-Fraud Petition investigation. Exc. 39-49. Those affidavits are dated October 19, 2012, well over a month after the September hearing resolving the Fraud claim. It is clear that what OEFA had as evidence that bore on the fraud claim at the time OEFA filed the Fraud Petition were some banks statement, NSF notices and information gleaned from Ms. Thissen and Mr. Rogers – which the Superior Court held did not constitute a reasonable investigation.

Nor do OEFA's public policy arguments that OEFA will be chilled from protecting **elderly** Alaskans by an award of attorneys' fees, hold water. The Superior Court correctly noted (Exc. 54-55) that OEFA's important duty to protect **elderly** Alaskans from **financial** exploitation, is not well served by an improperly investigated case that harms the very person OEFA is to protect. A fees award if a reasonable investigation is not done, does not chill OEFA. A reasonable investigation is the minimum to expect and require from public servants charged with protecting seniors. A reasonable investigation would have saved OEFA the extensive staff and counsel time it has invested in this case.

\*22 The Superior Court's finding that OEFA failed to undertake a reasonable investigation is well supported by the record. OEFA only secured Mrs. Rogers' bank records after it filed the Fraud Petition. Exc. 209, 1. It then relied on Ms. Thissen and Mr. Rogers' explanation of those records to pursue the Fraud Petition. Tr. 93-100, 151-177. Exc. 41 (at para. 8), 39 (at paragraph 2). But those two had little familiarity with the expenditures reflected in the bank records, as their adult lives had been spent away from Juneau. Tr. 289-290. OEFA did not question Ms. Fadaoff. Exc. 39-49 (Affidavit of Ms. Frederick and Mr. Feliciano which neither indicates they questioned Ms. Fadaoff). OEFA did not question Mr. Williams<sup>17</sup> about Ms. Fadaoff's expenditures, or his trailer. Id. Nor did it question Mrs. Rogers' friends about the dinner parties or the family cat. Id. OEFA did not subpoena credit card or airline records regarding the questioned expenditures. Id. In short, OEFA shot first and asked questions later. Doing so was vexatious, malicious, in bad faith, and frivolous, entitling Mrs. Rogers and Ms. Fadaoff to the attorney fees they were awarded by the Superior Court because OEFA lacked just cause to file the Fraud Petition.

*In Re Guardianship of McGregory* 193 P.3d 295, 300 (Ak 2008), a guardianship case, applied [Civil Rule 82](#) to an award of fees against the State of Alaska, but only to the extent the State acted vexatiously, in bad faith, maliciously, frivolously or brought the case without just cause. The Superior Court extended *McGregory* to award the fees here

\*23 at issue in this protective proceedings under [AS 13.26.207](#) – [AS 13.26.209](#), the Fraud Petition.

If this Court extends *McGregory* to cover [AS 13.26.207](#) protective proceedings (Fraud Petition), then *McGregory* supports the award of the disputed fees as OEFA's actions are vexatious, in bad faith, malicious, frivolous and the Fraud Petition brought without just cause.

Even without extending *McGregory*, [Civil Rule 82\(b\)\(3\)\(g\)](#) supports the award of fees. [Civil Rule 82\(b\)\(3\)\(g\)](#) provides for an award of full fees if the losing party acted vexatiously or in bad faith, with full fees to be awarded where the facts are so deficient as to reasonably permit an inference of vexatious or bad faith litigation conduct. See Cross Appellants Brief at pages 10-11 for quotations from applicable [Civil Rule 82](#) cases.

The Fraud Petition was vexatious and in bad faith if it was so factually deficient as to warrant an inference of vexatious or bad faith conduct. *Johnson v. Johnson*, 239 P. 3d 393, (AK. 2010).

In *Garrison v. Dixon*, 19 P3d at 1234-1235, the plaintiff produced no credible evidence to support its claim. Nor did OEFA here. As in *Garrison*, OEFA vigorously pursued its claims, only to ultimately reach a settlement in which Mrs. Rogers and Ms. Fadaoff completely prevailed.

The September hearing established OEFA brought the Fraud Petition on the basis of information supplied to it by Ms. Thissen and Mr. Rogers. Ms. Thissen filed the two \*24 Conservatorship Petitions, along with the Report of Harm to the Adult Protective Services on July 31, 2012, after reviewing two bank statements and some NSF notices. Geoff Rogers, once Ms. Thissen raised the expenditures with him, did not consult Ms. Fadaoff concerning the expenditures. Tr. 191 lines 3-18. OEFA never inquired of Ms. Fadaoff concerning the questioned expenditures. Exc. 39-49. Ms. Muldoon interviewed Mrs. Rogers, but at the time Ms. Muldoon did so she did not have the **financial** records to ask detailed questions concerning the fraud allegations. Tr. 68-69. OEFA filed the Fraud Petition before it received the subpoenaed bank records.<sup>18</sup> Exc. 209, 1. OEFA proceeded without ever inquiring of the one person who could explain the expenditures. In fact, OEFA sought to hide its investigation from Mrs. Rogers and her counsel, when in seeking bank records, it told the bank not to inform Mrs. Rogers or her counsel of the subpoena OEFA issued to the bank. Exc. 215. At the September hearing, OEFA introduced no testimony concerning its own independent investigation and analysis of the alleged fraud. Tr. 230-238. It relied only on Ms. Thissens' and Mr. Rogers' testimony, who had at best very limited knowledge of the **financial** situation between Mrs. Rogers and Ms. Fadaoff. Tr. 94-100, 102-103, 154-155, 189-191, 289-290.

At the hearing, Ms. Fadaoff explained each of the questioned expenditures. The airfare to Seattle for she and Mr. Williams for medical treatment was repaid by them (Tr. 349-351). The alleged airfare to Minnesota for Ms. Fadaoff was actually airfare for Ms. Thissen to travel to Juneau to care for Mrs. Rogers while Ms. Fadaoff went to Seattle for \*25 medical treatment. Tr. 290-292. The vet charges were for a cat which was the family cat who lives with Mrs. Rogers, and provides comfort for her. Tr. 353-354. The food expenditures were not only for Mrs. Rogers but were part of regular, frequent and extensive social dinners which had always been a part of Mrs. Rogers' life. Tr. 336. The groceries for Ms. Fadaoff and Mr. Williams were part of her compensation pursuant to the written agreements she had with her father and mother. The compensation for Ms. Fadaoff, whether by way of a check to her or directly paying her expenses, was not out of line with caregiver costs in Juneau, and explained the other expenditures questioned by OEFA, Mr. Rogers and Ms. Thissen. Tr. 357-359. Ms. Fadaoff had in place care giver agreements with her parents that provided for compensation to her for care giving. Exc. 80-83, 85. The trailer repair expenses were in exchange for repairs to and painting of the home in which Mrs. Rogers resided. Tr. 323-327. OEFA offered no evidence at the hearing to contradict Ms. Fadaoff's explanations of the questioned expenditures.

In ruling from the bench, at the conclusion of the hearing, the Superior Court found: "I don't consider that to be exploitation and I, frankly don't know how one gets to that place where it is felt to be exploitation". Tr 405. In awarding attorneys fees the Superior Court held:

"In making the statement I made at the conclusion of the September, 2012 hearing, I concluded that the petition was brought without just cause. I continue to believe that now. I do not believe an objective observer who made reasonable inquiries would conclude that there was just cause for believing that there was fraud or **financial** exploitation. I therefore award attorney's fees in connection with the protective order proceeding pursuant to AS 13.26.131 (d)."

\*26 Given the record in this case, the dearth of an investigation by OEFA, and the lack of any facts to support the fraud allegation, the Superior Court did not **abuse** its discretion in awarding fees.

OEFA essentially chose to believe Ms. Thissen and Mr. Rogers without ever undertaking its own investigation to determine independently if there was any basis for their concerns. The hearing showed there was no basis for the objections; and a reasonable investigation, would have resolved this matter in short order. Instead, OEFA plowed blindly ahead, ignoring the dictates of [Civil Rule 11](#) that required a reasonable inquiry to ground the Fraud Petition in fact before filing. There is nothing reasonable in failing to inquire of Ms. Fadaoff, nor to secure bank and credit card records or question third parties who had relevant information bearing on the expenditures.<sup>19</sup>

**AS 13.26.353(c) Alternatively Supports The Fees Award.** As an alternative ground for upholding the fees award, [AS 13.26.353\(c\)](#) supports the award.<sup>20</sup> Ms. Fadaoff holds Mrs. Rogers power of attorney. Exc. 67-71. [AS 13.26.353](#) provides that a third party, here OEFA, which fails to honor a properly executed statutory form power of attorney may be liable in a civil action to the power of attorney principal for costs and fees associated with the failure to comply with the statutory form power of attorney.

Finally, as with Conservatorship Petition, (1JU-12-212PR), OEFA's unsuccessful attack on Ms. Fadaoff's use of her power of attorney, exposes OEFA to an award of attorney fees pursuant to [AS 13.26.353\(c\)](#). See Argument at Cross Appellant's Brief at pages 13-14.

## V. CONCLUSION

This Court should uphold the award to Mrs. Rogers of \$8,607.75 and Ms. Fadaoff \$14,025.00.

### Footnotes

- 1 Ms. Thissen's mother is Jean Rogers, her sister is Sidney Fadaoff, and her brother Geoff Rogers. Tr. 289.
- 2 Collectively the two Guardian/Conservatorship Petitions are referred to as the Conservatorship Petition.
- 3 Ms. Fredericks was the attorney for the Office Of Fraud And **Elder** Assistance (OEFA). R. 249.
- 4 Fraud for purposes of [AS 13.26.207\(a\)](#) also includes robbery, extortion, coercion or offenses against property, all as defined in the criminal code, but no such allegation were made in this case.
- 5 Tr. 402-406.
- 6 She also held her father George Rogers' power of attorney. Exc. 60-66.
- 7 Candace Brower and Debra Schorr were the appointed visitor pursuant to [AS 13.26.106\(c\)](#), but OPA removed them, and the Court once again appointed them visitor. R. 1137-1144.
- 8 That Mrs. Rogers was receiving proper care in and of itself is strong evidence that Ms. Fadaoff was not wasting Mrs. Rogers' monies. Given Mrs. Rogers' limited resources, that she was well cared for indicates her monies were not wasted. Yet OEFA ignored what her care indicated about the lack of wasting of her resources.
- 9 The definition of fraud applicable in the Conservatorship Petition is the same as the definition of fraud in the Fraud Petition. See [AS 44.21.415\(g\)\(1\)\(c\)](#) (governing Conservatorship Petition) to [AS 13.26.324\(3\)](#) (governing Fraud Petition).
- 10 Exc. 361-364.
- 11 But the subpoenaed 2012-2014 Alaska Pacific Bank records were no received until after the Fraud Petition was filed. Exc. 209, 213, 215.
- 12 The bank account was a joint account with right of survivorship among Mrs. Rogers, Ms. Fadaoff and Mr. Rogers. Exc. 225-229.
- 13 On July 6, 2012 Ms. Fadaoff provided a spreadsheet breaking down expenditures (Exc. 93), but it was ignored. Tr. 334-335.
- 14 Ultimately the Superior Court found the overdrafts to be carelessness not fraud. Exc. 54.
- 15 OEFA has authority to investigate complaints involving fraud committed against older Alaskans, and in conducting such investigations, OEFA "may issue subpoenas, conduct interviews, and examine business records, advances, transactions, and relevant records associated with the alleged fraud." [AS 44.21.415](#).
- 16 Exc. 3.
- 17 Mr. Williams is Ms. Fadaoff's boyfriend who was living with her in the upstairs apartment in the house in which Mrs. Rogers lived.
- 18 OEFA has subpoena power. [AS 44.21.415](#).
- 19 OEFA failed to question Mr. William or any of Mrs. Rogers friends concerning the expenditures on the trailer in exchange for house painting or the expenditures for food at social dinners and gatherings. Exc. 39-49.
- 20 The court may uphold a trial court decision on alternative grounds. *Mat-Su Medical Center, LLC v. Advanced Pain Centers Of Alaska, Inc.*, 218 P.3d 698, 705-706, n. 26 (AK 2009) (See *Snyder v. Am. Legion Spenard Post No. 28*, 119 P.3d 996, 1001 (Alaska 2005) ("We may affirm a judgment on any grounds that the record supports, even if not relied on by the superior court." (citing *Marshall v. First Nat'l Bank of Alaska*, 97 P. 3d 830, 835 (Alaska 2004); *Ransom v. Haner*, 362 P.2d 282, 285 (Alaska 1961).